Supreme Court of the United States

OCTOBER TERM, 1945 No. 516

LAURENCE H. ELDREDGE AND THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, AS CO-EXECUTORS UNDER THE WILL OF CONSTANCE GARDNER TAYLOR, DECEASED, PETITIONERS,

vs.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE AT PHILADELPHIA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE
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Petitioners,

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE AT PHILADELPHIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Laurence H. Eldredge and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Co-executors under the Will of Constance Gardner Taylor, Deceased, respectfully shows to this Honorable Court:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a civil action to recover $44,901.70, with interest, paid to respondent for Federal Estate Tax (R. 2). The District Court entered judgment for the respondent

(R. 19). The Circuit Court of Appeals affirmed the judgment and subsequently denied a petition for rehearing (R. 26-27). Petitioners seek a review and a reversal of the judgment on the ground the tax was illegally assessed and collected.

The question presented is whether the principal of an inter vivos trust created by decedent in 1930 should be included in her estate for Federal Estate Tax purposes under Section 302(c) of the Revenue Act of 1926, 44 Stat. 70, which is now Section 811(c) of the Internal Revenue Code. It is conceded by respondent that the transfer was not made in contemplation of death within the meaning of Section 811(c) (defendant's twelfth request for findings of fact, R. 17). Also, because the transfer in question was an irrevocable lifetime transfer with a life interest retained, created prior to the Joint Resolution of Congress of March 3, 1931, the United States Attorney in a letter to Judge Kirkpatrick dated May 3, 1944, expressly abandoned the contention "that the settlor's reservation of life estate in the trust income to herself brought the transferred property under the taxing statute". Consequently, the single narrow question presented is whether the terms of the trust agreement and the circumstances surrounding its execution establish that the transfer effected by the trust was one "intended to take effect in possession or enjoyment at or after (settlor's) death" within the meaning of Section 302(c).

The facts surrounding the creation of the trust and its terms are:

In 1928 the decedent fell in love with Presley M. Taylor. She had been living in Massachusetts with her second husband, William Gordon Means, and her three children, William, Anna and Augustus. The third child was the son of Mr. Means, the other two were children of the first husband. Mrs. Means (as she then was) left her husband in October 1928 and came to Philadelphia (R. 8). She planned in due course to institute divorce proceedings in Philadelphia, with the expressed intention of marrying Mr. Taylor after a final

divorce decree was obtained (R. 8, 15). In November 1928, Mr. Means obtained a court order in Massachusetts awarding the custody of his three-year-old son Augustus, to him (R. 12).

Mr. Means did not trust his wife's business judgment and considered her to be reckless in spending money and incurring personal indebtedness (R. 15). He was concerned about the future financial welfare of his son and the other two children. He told his wife "that before obtaining her divorce she must make adequate and equal provision by an irrevocable trust for her three children, Mrs. Means to have the income of the said trust for the period of her life" (R. 15). In other words, his position was that he would contest the divorce proceedings unless Mrs. Means made absolute and final provision for her children without any string or tie attached to it. His reason was that "I wanted to insure provision for her children, whose financial situation I felt would be endangered unless she parted irrevocably with the funds in question" (R. 15).

This proposal was finally agreed to. A trust deed was executed. The securities, together with the deed of trust, were placed in escrow on February 19, 1930. Meanwhile Mrs. Means brought suit for divorce in Pennsylvania and a final decree of divorce was entered on June 2, 1930 (R. 14).

In June 1930, in accordance with the escrow agreement, the securities were turned over to the trustees (R. 14).

The important paragraph of the deed of trust provides:

> "My said Trustees shall pay the net income of the trust fund so created to myself during my life and upon my death they shall divide the said fund into as many equal parts as there shall be children of mine then living and issue of any child of mine who shall have deceased leaving issue then living, the issue of each deceased child counting as one, and pay over, transfer, and convey one of said parts outright and free of any trust to each such child and/or to such issue of any deceased child, such issue to take by right of representation per stirpes and not per capita; and if I shall

die leaving no child and no such issue then living, pay over, transfer, and convey the said trust fund as I may by will appoint; and in default both of such child and/or such issue and of such appointment, pay over, transfer, and convey the said funds to my heirs." (R. 11).

When this deed was executed on February 19, 1930, the settlor was 35 years old and had three living children who were 13, 10 and 4 years of age, respectively (R. 8). They were all alive when the settlor died in 1941, and entitled to receive the principal of the trust (R. 8-9).

Petitioners excluded the value of the trust from the estate tax return. The Commissioner included it and gave notice of a proposed deficiency in estate tax. The proposed deficiency was paid, claim for refund filed, and thereafter this suit was instituted (R. 9-10).

II. JURISDICTION

1. The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, ch. 229, 43 Stat. 938 (28 USCA § 347).

2. The nature of the case is the proper construction of the Revenue Act of February 26, 1926, ch. 27 § 302(c), 44 Stat. 70, 26 U.S.C. 811(c).

3. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed is June 12, 1945 (R. 27). A timely petition for rehearing was filed which was denied on August 2, 1945 (R. 27).

4. The following cases sustain the jurisdiction of this Court:

May v. Heiner (1930), 281 U.S. 238

Goldstone v. United States (1945), 325 U.S. ——

McEachern v. Rose (1937), 302 U.S. 56, 59

III. QUESTION PRESENTED

Where decedent (prior to March 3, 1931) created an irrevocable inter vivos trust with the actual intent of making immediate and final provision for her three existing children, in which she reserved the income for life and provided that upon her death the principal should be paid to her children then living and issue of any deceased child, is the trust taxable under Section 302(c) of the Revenue Act of 1926 as a transfer "intended to take effect in possession or enjoyment at or after (her) death" because decedent added an additional provision that in default of surviving issue the principal should be paid "as I may by will appoint" and in default of appointment "to my heirs"?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The question, whether an inter vivos trust is subject to the Federal Estate Tax under Section 302(c) of the Revenue Act of 1926, where the facts are as in this case, is an important question of Federal Estate Tax law which has not yet been, but should be, settled by this Court.

2. The Circuit Court of Appeals erred in holding that this case is governed by the decision of this Court in *Fidelity-Phila. Trust Co. v. Rothensies*, 324 U.S. 108, and did not give proper weight to the fact that in that case the settlor gave the remainder to persons not in existence at the time the trust was created or at the time she died whereas in the case at bar the settlor gave the entire remainder absolutely to persons who were in existence at the time the trust was created and at the time she died, by reason of which fact it was certain at and before settlor's death that her power of appointment was nugatory.

3. The decision of the Circuit Court of Appeals filed on June 12, 1945, and its construction of the decision of this Court in *Fidelity-Phila. Trust Co. v. Rothensies*, 324 U.S.

108, gives no effect to the explanation of that case and the limitations on its application set forth by this Court in *Goldstone et al. v. United States*, 325 U.S. , decided on June 11, 1945.

4. The decision of the Circuit Court of Appeals and its construction of the decision of this Court in *Fidelity-Phila. Trust Co. v. Rothensies*, 324 U.S. 108, is in conflict with recent decisions of the Tax Court and is inconsistent with a recent decision of the Circuit Court of Appeals for the Second Circuit construing said decision of this Court.

5. The law as to what transfers of property effected by an inter vivos trust are transfers "intended to take effect in possession or enjoyment at or after (settlor's) death" within the meaning of Congress is not yet settled with respect to facts such as those presented in the case at bar and further clarification by this Court will bring greater certainty into the law for the guidance of courts and counsel.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the United States Circuit Court of Appeals for the Third Circuit to certify and to send to this Court a full and complete transcript of the Record and of all proceedings had in the case numbered and entitled on its Docket No. 8725, October Term, 1944, Laurence H. Eldredge and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as co-executors under the Will of Constance Gardner Taylor, Deceased, Plaintiffs-Appellants, v. Walter J. Rothensies, Collector of Internal Revenue at Philadelphia, Defendant-Appellee, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment therein of said Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and that your

petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

LAURENCE H. ELDREDGE,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

Co-executors under the Will of Constance Gardner Taylor, deceased,

Petitioners,

By LAURENCE H. ELDREDGE,

Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

Eldredge v. Rothensies (1944), 57 F. Supp. 474 (R. 17-19).

Eldredge v. Rothensies (CCA 3—1945), 150 F. 2d 23 (R. 22-26).

II. JURISDICTION

Stated under heading II in the petition, and said statement, in the interest of brevity, is adopted and made part of this brief.

III. STATEMENT OF THE CASE

Stated under heading I in the petition, and said statement, in the interest of brevity, is adopted and made part of this brief.

IV. SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. Said Circuit Court of Appeals erred in holding that this case is ruled by the decision of this Court in **Fidelity-Phila. Trust Co. v. Rothensies,** 324 U.S. 108.

3. Said Court erred in not applying to this case the rule announced by this Court in **May v. Heiner,** 281 U.S. 238.

4. Said Court erred in holding that the property transferred by decedent by deed dated February 19, 1930, is taxable as a part of decedent's estate under Section 302(c) of the Revenue Act of 1926.

V. ARGUMENT

SUMMARY

Point A. The question whether an inter vivos trust is subject to Federal Estate Tax under Section 302(c) of the Revenue Act of 1926 on the present facts is an important question of Federal Estate Tax law which has not yet been settled by this Court; and the decisions of this Court relied on by the Circuit Court of Appeals are clearly distinguishable on their facts from the present case.

Point B. The decision of the Circuit Court of Appeals for the Third Circuit in this case is inconsistent with a recent decision of the Circuit Court of Appeals for the Second Circuit and is in conflict with recent decisions of the Tax Court construing Section 811(c) of the Internal Revenue Code and the decision of this Court in **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S 108.

Point A

The Question Whether an Inter Vivos Trust Is Subject to Federal Estate Tax Under Section 302(c) of the Revenue Act of 1926 on the Present Facts Is an Important Question of Federal Estate Tax Law Which Has Not Yet Been Settled by This Court; and the Decisions of This Court Relied on by the Circuit Court of Appeals Are Clearly Distinguishable on Their Facts from the Present Case.

Section 302(c) of the Revenue Act of February 26, 1926, 44 Stat. 70, brings within a decedent's gross estate for Federal Estate Tax purposes property transferred "by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death. . . ."

The facts in this case, as stated in the foregoing petition, differ in important particulars from those in cases

previously passed upon by this Court construing this statute. In **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S. 108, the trust provided for income to Mrs. Stinson (the settlor) for her life, then to A and B (her unmarried minor daughters) for life, with remainders at the death of A and B to the surviving descendants of each per stirpes, with cross gifts if either died without descendants; if both died without descendants the corpus was to be paid to such persons as settlor should appoint by will.

In the present case, the Circuit Court of Appeals said that this Court held in the cited case that the reserved power of appointment was a "vital factor" (R. 24). But it was *the facts to which this language of the trust deed applied* which was the vital factor. Those facts were that the settlor, as pointed out by Judge Biggs in his opinion in the Circuit Court of Appeals in that case, "put the remainders in the grantor's grandchildren who were not in esse at the time the indenture was executed": **Fidelity-Phila. Trust Co. v. Rothensies** (CCA 3—1944), 142 F.(2d) 838, 840.

In his concurring opinion, Judge Jones also emphasized that this was the vital factor: 142 F.(2d) 841.

The day the Stinson trust was drawn it was clear that the remainders would pass under settlor's will unless her small daughters grew up, married, had children and they outlived both settlor and her daughters. Whether this would occur could not be determined until at or after settlor's death. Because of these facts (rather than the fact a power of appointment would operate on the remainders if they stayed within the settlor's control) the Circuit Court of Appeals considered that the settlor "selected to hold in suspense the ultimate disposition of the property until the moment of death": 142 F.(2d) 838, 840.

When Mrs. Stinson died she still had no grandchildren *and if her two daughters had died the following day the remainders would have passed under Mrs. Stinson's will* rather than under the deed of trust.

We submit that when this Court affirmed the judgment in the Stinson Estate case it was this factual picture, rather

than the mere existence of a power of appointment in the deed of trust, which was considered to be "a vital factor". This seems clear from what was said by this Court on June 11, 1945, in **Goldstone v. United States,** 325 U.S ——, 65 S. Ct. 1323. In the case at bar the Circuit Court of Appeals filed its printed opinion on June 12, 1945, and it is obvious that when it prepared the opinion it did not have the benefit of this Court's later explanation of the scope of the decision in the Stinson Estate case. (The case was called to the attention of the Circuit Court of Appeals in the petition for rehearing.)

In **Goldstone v. United States,** supra, Mr. Justice Murphy, in explaining his opinion in the Stinson Estate case said:

> "The disappearance of a decedent's reversionary interest, together with the resulting estate tax liability, prior to death through events beyond the decedent's control *is a possibility in many situations such as the one in issue.*[3] " (Italics added.)

If we correctly understand this language it means that an examination of the facts in the particular case may lead to a finding of fact by the Court that there has been a "disappearance of a decedent's reversionary interest" prior to the death of the decedent, together with "the disappearance of" the "resulting estate tax liability."

Mr. Justice Murphy explained this sentence by saying in the footnote 3, appended to it:

> "Thus, in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108, the decedent's contingent power of appointment was exercisable only if her two daughters died before her and left no surviving descendants. *If* the daughters died first but left surviving descendants, *it would be certain before the decedent's death that her power of appointment would be nugatory.* But such a contingency did not happen. *At the time when the decedent died there was still the possibility that her power of appointment might be effective.* . . ." (Italics added.)

We understand this to mean that, despite the reserved power of appointment, if at the time of settlor's death there had been in existence "surviving descendants" to take the remainder the power of appointment "would (have been) nugatory" and the trust not taxable. But because such class was still not "in esse" upon settlor's death "there was still the possibility that her power of appointment might be effective."

No such possibility existed in the case at bar. At the time Mrs. Taylor died her three children who owned the entire remainder were there to take it—and did take it. At the moment of her death she did not have possession of that power of appointment. By reason of the existence of her three children at the time the trust was created and at the time of her death it was "certain" that "her power of appointment would be nugatory."

Mr. Justice Murphy also said:

> "But the imposition and computation of the estate tax are based upon the *interests in actual existence* at the time of the decedent's *death.* It follows that only those events *that actually occurred prior to that moment* can be considered in determining the existence and value of the taxable interests. Events that might have *but failed to take place* so as to erase a decedent's reversionary interest must be ignored; such *unrealized possibilities,* if significant at all, only add to the remoteness of the reversionary interest." (Italics added.)

In the present case at the moment of Mrs. Taylor's death she had no "interests in actual existence" in the remainder because the "actual existence" of her three living children put the remainder in them and made the power of appointment "nugatory". The word "nugatory" means "of no force; inoperative; ineffectual; invalid; futile": Webster's New International Dictionary.

In the Stinson case "events that might have but failed to take place" before settlor's death did not free the trust from tax. In the case at bar "those events that actually occurred prior to that moment" should free the Taylor Estate from the tax erroneously assessed against it.

The second case in this Court relied on by the Circuit Court of Appeals is **Commissioner v. Estate of Field** (1945), 324 U.S. 113 (R. 24-25). It is clearly not in point on its facts. "The grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces": 324 U.S. 113, 117, per Mr. Justice Douglas.

It may be argued that because Mrs. Means' (Taylor's) issue had to survive her their interests were conditioned on her death and hence were testamentary. However, if another life tenant were substituted for Mrs. Means (Taylor) the interests of her issue would be conditioned on other than survivorship of her. The quality of the gift to her issue and the nature of their remainder is not affected by the identity of the life tenant. And a transfer otherwise unobjectionable is not brought within Section 302(c) (when made prior to March 3, 1931) because the settlor puts the life estate in herself rather than in somebody else. Such is the holding in **May v. Heiner** (1930) 281 U.S. 238, 50 S. Ct. 286. In that case the transfer was to W for life, then to G (settlor) for life, then the remainder to G's four children, their appointees, or heirs. In holding the transfer not taxable the Court said that the transfer "was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed": 282 U.S. 243. Yet, if Mrs. May's four children had predeceased her without issue and without exercising their power of appointment, the remainder would have reverted to Mrs.

May. There was an actual possibility the remainder would revert to her and pass under her will or the intestate law.

In **May v. Heiner** the Court relied upon **Reinecke v. Northern Trust Co.** (1929), 278 U.S. 339, 49 S. Ct. 123. There the transfer was to A for life with vested remainders over to take effect at A's death or five years after G's (grantor's) death, whichever was later. The Court held that the mere passing of possession and enjoyment from the life tenant to the remainderman at or after the date of G's death did not subject the transfer to tax under section 302(c). From this case it seems that "at or after death" means not only that the interests take effect at the time of G's death but also that they take effect *because* of his death. To make the section applicable G's death must determine not only when but also to whom the property will pass.

The year after **May v. Heiner** was decided it was followed in **Morsman v. Burnet** (1931), 283 U.S. 783, 51 S. Ct. 343, and in **McCormick v. Burnet** (1931), 283 U.S. 784, 51 S. Ct. 343. In the **Morsman** case the transfer held not taxable, was to G for life, then income for two years to his four sons, then corpus to his then surviving sons, and the issue of any deceased son. In that case if there had been no sons or issue two years after G's death the remainders would have failed and the property would have reverted to G and passed under the provisions of his will. Yet, this actual possibility of reverter was ignored by the Court.

In the **Burnet** case the transfer held not taxable, was to G (or one designated by her) for life, then for life to G's three children, with provision the trust should end upon the death of the survivor of the children and a further provision that the principal should be repaid to the settlor "if she shall then be living".

Six weeks after the last two cases were decided the Court decided **Klein v. United States** (1931), 283 U.S. 231, 51 S. Ct. 398. The case involved a transfer of land by deed, to grantor's wife, and not an inter vivos trust. The habendum clause of the deed provided "To have and to hold the said lands unto the said grantee for and during the term of

her natural life" and that if the grantee survived the grantor "then and in that case only the said grantee shall . . . hold the said lands in fee simple". Otherwise the fee minus the life estate was expressly "reserved to said grantor and exempted from this conveyance". The Court held that the value of the land after deducting the life estate was taxable to the grantor's estate, he having predeceased his wife. The Court pointed out that "The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder". The Court said at page 234:

> "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event *which brought the larger estate into being* for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." (Italics added.)

It is clear that this decision is in no way inconsistent with **May v. Heiner.** It is the unanimous decision of the same Court which had just unanimously reaffirmed **May v. Heiner** in a group of three cases.

The next important case is **Helvering v. Hallock** (1940), 309 U.S. 106, 60 S. Ct. 444. The facts are simple. A group of inter vivos trusts were involved. In the **Hallock** trust G, pursuant to a separation agreement, gave W the income for life and provided that upon her death the trust should end and the principal be returned to G, if then living, otherwise to G's named children. In the **Huston** trust G gave W a life estate, with remainder in G, if he survived her, otherwise remainder to W at his death. In the **Bryant** trust G gave a life estate to W, then a life estate to G, and remainder to G's estate.

It is to be noted that in the **Bryant** trust nothing but a life estate was transferred and G always had a true reversion which was part of his estate at his death and tax-

able under Clause (a) of Section 302, regardless of Clause (c); and in the other cases life estates were transferred with the remainder in G if then living. The similarity to **Klein v. U.S.** is apparent (except that the **Bryant** case was even stronger for the Government and all the Courts through which it passed agreed that the reversion was taxable). And it was to the **Klein** case that the Court turned as furnishing "a harmonizing principle" in construing Section 302(c). Mr. Justice Frankfurter in his opinion did not purport to make new law. He purported to free the rule of the **Klein** case from the limitations imposed upon it by the **St. Louis Trust Co.** cases. He quoted with approval the language in the Klein case already quoted in this brief and Mr. Justice Stone's dissenting opinion in the **St. Louis Trust Co** cases. In discussing the **Klein** case he said "By bringing into the gross estate at his death that *which the settlor gave contingently upon it*, this Court fastened on the vital factor": 309 U.S. 112. (Italics added.)

In considering what Mr. Justice Frankfurter meant by this language we must consider the facts of the cases then before the Court and the facts in "the three recent decisions" of the Supreme Court which he was analyzing. In the **St. Louis Trust Co.** cases, which were overruled, a father transferred a life estate to his daughter with remainder in himself if living. In his dissenting opinion in those cases Mr. Justice Stone said: "It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter": 296 U.S. 39, 47.

So in all of the transfers involved in **Helvering v. Hallock,** in the **Klein** case, and in the **St. Louis Trust Co.** cases we find a gift of life estates only which could (in five of the six transfers) become more if the grantor predeceased the grantee. *But in the case at bar the settlor made a complete present gift* and reserved for herself only the life estate, which is permissible under **May v. Heiner.** She didn't keep any "string" attached to the property. In de-

termining what is meant by this word the setting in which it first appears is of importance. It was first used by Mr. Justice Stone in his dissenting opinion in **Helvering v. St. Louis Union Trust Co.** (1935), 296 U.S. 39, 56 S. Ct. 74. After pointing out that the father "did not desire to make a complete gift" and "wished to keep the property for himself in case he survived his daughter" and "He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter" Mr. Justice Stone went on to say:

> "Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device — *what particular string*—the decedent selected *to hold in suspense* the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form": 296 U.S. 47. (Italics added.)

When Mr. Justice Frankfurter quoted this language with approval in **Helvering v. Hallock** he was applying it to the very same type of transfer which Mr. Justice Stone had before him, i. e., the gift of a life estate, with remainder in G unless he predeceased the life tenant. Consequently what is meant by a "string" was in no sense extended or broadened in **Helvering v. Hallock.**

But in the case at bar the settlor did not "hold in suspense" the remainder until her death and thereby attach a string to it. She made an absolute, unqualified gift of the remainder to her children and to issue of deceased children, just as was done in **May v. Heiner.** The language in it applies exactly: "At the death of Mrs. May (here Mrs. Constance Gardner Means Taylor) no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed": 281 U.S. 243. Specifically saying in the deed in the case at

bar what would happen in the remote event of the extinction of all lineal descendants of the settlor (and thus here spelling out what the law would have said in the same situation in **May v. Heiner**) did not "hold in suspense" the gift to the children and their issue.

The foregoing reviews all of the cases in this Court which deal with the general problem, and in each case in which a tax was upheld the facts were significantly different from those now presented to the Court. On its material facts the case is closer to **May v. Heiner** than to any other case. If in drafting the sentence of the deed of trust which appears on p. 3 of the petition for a writ of certiorari the draftsman had stopped at the semicolon the case would be identical with **May v. Heiner** on its material facts. This Court held that on such facts the transfer by deed of trust was not taxable under Section 402(c) of the Revenue Act of 1918 which was the predecessor of Section 302(c) of the Revenue Act of 1926 (now Section 811(c) of the Internal Revenue Code).

The language added after the semicolon takes nothing away from the remaindermen. It reflects a cautious draftsman's attempt to cover all possible contingencies. On the facts of the case at bar this added language was inoperative, ineffectual and futile; in short, it was "nugatory". That being so, the language after the semicolon is of no legal importance. The case is then ruled by **May v. Heiner** and the Circuit Court of Appeals erred in not applying that case and in holding that the existence of a "nugatory" power of appointment brought the case within the rule of **Fidelity-Phila. Trust Co. v. Rothensies,** supra, in which the power of appointment was *not* nugatory.

We submit that this is an important question of Federal Estate Tax law which should be definitely settled by this Court in order to eliminate the confusion and uncertainty which presently exists in the lower Federal courts and in the minds of the Bar.

Point B

The Decision of the Circuit Court of Appeals for the Third Circuit in This Case Is Inconsistent With a Recent Decision of the Circuit Court of Appeals for the Second Circuit and Is in Conflict With Recent Decisions of the Tax Court Construing Section 811(c) of the Internal Revenue Code and the Decision of This Court in Fidelity-Phila. Trust Co. v. Rothensies (1945), 324 U.S. 108.

Section 302(c) of the Act of February 26, 1926, 44 Stat. 70 (now Internal Revenue Code, Section 811(c)), applies to a transfer "intended to take effect in possession or enjoyment at or after his death". It was the intent of Congress to make the *intent* of the decedent controlling. In determining the decedent's intent (which is a fact to be derived from the circumstances in which she spoke as well as from what she said) it is important to consider that this trust was drawn pursuant to an agreement to make immediate and irrevocable provision for settlor's then living children. Mr. Means was not willing to have this postponed until Mrs. Means' death (R. 15). The price she paid for an uncontested divorce was to make a complete transfer of certain property for her children, reserving to herself the income for life. There was no string attached to it. "Upon my death they shall divide the said fund into as many equal parts as there shall be children of mine then living and issue of any child of mine who shall have deceased leaving issue then living, the issue of each deceased child counting as one, and pay over" the principal to them (R. 11).

But the Circuit Court of Appeals took the view that the possibility that settlor's entire living line might have (but did not) die out before her death was sufficient, under the rule in **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S. 108, to make the trust taxable. It said "Should they have predeceased the settlor, the property would have re-

verted to her to be disposed of as she might by will elect" (R. 26) and "The possibility of the settlor exercising this power ceases only at her death" (R. 25).

We submit that this is inconsistent with the decision of the Second Circuit in **Commissioner v. Irving Trust Co.** (CCA 2—1945), 147 F. (2d) 946, in which the facts were that the grantor provided for a stated life income to W and the balance of income to himself for life with remainders to his issue and in default of issue to his next of kin under the intestate laws. *The deed also gave the trustee absolute discretion to pay over principal to settlor during his lifetime.* The Circuit Court of Appeals for the Second Circuit held that the trust was not taxable under Section 302(c) of the Act of 1926 as construed by this Court in the **Stinson Estate** case. Judge Augustus Hand did point to the power of appointment in that case as a distinguishing feature. But surely there is no controlling significance in directing payment of corpus "as I may by will appoint" instead of directing payment to "my estate", "my administrator" or "my next of kin" or actually receiving it in the trustee's discretion. The lack of words constituting a power of appointment over an undivested remainder (and the remainder in the **Stinson** case was undivested) would not suffice to free it from taxation: **Bryant v. Helvering** (1940), 309 U.S. 106, 60 S. Ct. 444. By the same token, the presence of a nugatory power of appointment should not make taxable a remainder which the settlor has conveyed to living people.

If in the case at bar it be said that until Mrs. Taylor's death it was impossible to determine whether all her children and grandchildren would die first and bring the remainder back to go under her will, it must also be said that until the settlor's death in the **Irving Trust Co.** case it was impossible to determine whether the trustee would exercise his discretion and pay some or all of the corpus to the settlor

himself and also impossible to determine whether he would die leaving surviving issue.

We submit that these two cases, both decided after the decision of this Court in the **Stinson Estate** case, but before this Court explained that decision in the **Goldstone** case, are inconsistent. If one of these trusts is taxable and the other is not, we have a situation where corpus which might have been paid by the trustee to the settlor, or to his next of kin, is tax free and corpus which might have been paid to settlor's legatee is taxable. This seems to be a resurrection of the "elusive and subtle casuistries" which Mr. Justice Frankfurter sought to bury in **Helvering v. Hallock.** We submit that these decisions of the Second and Third Circuits are in substantial conflict and that the decision in the case at bar should, therefore, be reviewed and reversed.

Recent decisions in the Tax Court are also in conflict with the present case. In **Estate of Harris Fahnestock v. Commissioner** (1945), 4 T.C. — (No. 129), the trust provided for income to A for life with remainder to his issue, in default of issue to A's named sisters and their issue, and in default thereof "the entire principal of the trust shall revert to the Grantor or to his legal representatives". In other deeds of trust the same grantor provided that upon default of the named remaindermen "then to the Grantor; or if the Grantor be deceased to the personal representatives of the Grantor, to be by them distributed to the next of kin of the Grantor".

The Tax Court held the trusts were not taxable under Section 302(c) and reversed the Commissioner's ruling to the contrary. The **Stinson** case was distinguished as "a survivorship case".

The Tax Court decided the **Fahnestock** case on April 3, 1945, and followed it on April 16, 1945, in **Mary B. Hunnewell Est. v. Commissioner** (1945), 4 T.C. — (No. 132).

VI. CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

LAURENCE H. ELDREDGE,
Attorney for Petitioners.

INDEX

CITATIONS

671903—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 516

LAURENCE H. ELDREDGE AND THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, AS CO-EXECUTORS UNDER THE WILL OF CONSTANCE GARDNER TAYLOR, DECEASED, PETITIONERS

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE AT PHILADELPHIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 17–19) is reported in 57 F. Supp. 474. The opinion of the Circuit Court of Appeals (R. 22–26) is reported in 150 F. 2d 23.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 12, 1945. (R. 27.) The petition for rehearing was denied August 2, 1945. (R. 27–28.) The petition for a writ of certiorari was filed October 17, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1930 the decedent created a trust, reserving the income for life and directing that upon her death the corpus should be paid to her children living at that time or their issue. If no children or issue of any deceased child should be living at her death the corpus was to be distributed as the settlor might by will appoint. In default both of surviving remainderman and of such appointment, the property was to go to the settlor's heirs. The decedent died in 1941, leaving three children and one grandchild surviving. Is the value of the corpus of the trust includible in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after her death within the meaning of Section 811 (c) of the Internal Revenue Code?

STATUTE AND REGULATION INVOLVED

The statute and regulation involved will be found in the Appendix, *infra*, pp. 9–12.

STATEMENT

The facts as found by the District Court (R. 17), supplemented by the stipulation of the parties (R. 7–16), may be summarized as follows:

This is a suit to recover $44,901.70, alleged to have been collected illegally as an estate tax. (R. 17.)

The decedent, in 1930, prior to her divorce from her second husband, created an irrevocable *inter vivos* trust with respect to certain shares of stock then owned by her. The trust instrument directed the trustees to pay the net income to the settlor during her life. Upon her death, the corpus was to be divided and conveyed in equal shares to her children living at that time, the issue of any deceased child taking such child's share *per stirpes*. If no child and no issue of any deceased child should be living at her death then the corpus was to be distributed as the settlor might by will appoint. In default both of surviving remainderman and of such appointment, the property was to pass to the settlor's heirs. (R. 17.)

At the time of the transfer the settlor was thirty-five years old and the mother of three children who were then thirteen, ten and four. She died testate in 1941, survived by three children and one grandchild. (R. 17.)

The taxpayers, as co-executors under her will, duly filed a federal estate tax return showing a total gross estate of $50,241.47 and total deductions of $43,044.64. (R. 9.)

On the date of decedent's death the market value of the principal of the above-mentioned trust was $319,925.93. The Commissioner determined that the value of the trust property should be included in the gross estate and gave notice to the taxpayers of a deficiency in estate tax. On September 24, 1942, the taxpayers paid the Collector $44,901.70 on account of the deficiency and on September 30, 1942, they filed a claim for refund of that amount. On May 8, 1943, the claim for refund was rejected. (R. 9–10.)

This action was instituted on April 8, 1943. (R. 10.) The taxpayers made a motion for judgment on the record. (R. 1.) The District Court held that the value of the trust property was properly included in the decedent's gross estate (R. 17) and directed the entry of judgment for the Collector (R. 19). The court below affirmed. (R. 26.)

ARGUMENT

Both of the courts below held, correctly, we submit, that the instant transfer was intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of Section 811 (c) of the Internal Revenue Code, Appendix *infra*.[1] The decedent retained not only the income

[1] Since this trust was created in 1930, we are not here relying upon the amendments of 1931 and 1932 relating specifically to the retention of income for life; those amendments have been held to operate prospectively only. *Hassett* v. *Welch*, 303 U. S. 303.

for life from the trust property but also a contingent reversionary interest in the corpus, thus holding in suspense and delaying until her death or thereafter the ultimate possession or enjoyment of the trust property. In the circumstances this is clearly sufficient to subject the transfer to tax under *Helvering* v. *Hallock,* 309 U. S. 106; *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, affirming the decision of the court below reported in 142 F. 2d 838; *Commissioner* v. *Estate of Field,* 324 U. S. 113; and *Goldstone* v. *United States,* decided by this Court on June 11, 1945, No. 699, October Term, 1944, not yet reported.

The facts in the instant case are strikingly similar to those in the *Fidelity Co.* case, and both the courts below noted this in their opinions. However, the taxpayers attempt (Br. 10–14) to distinguish that case on the ground that there the property was ultimately to go to persons who were not living at the time of the grantor's death while here the grantor's children, who were designated as remaindermen, were living at the time the trust was created and at the time of her death. It is argued from this that while the possibility of reversion amounted to something in the *Fidelity Co.* case, it was nugatory in the instant one. We submit that this argument is unsound and that the reversionary interest in the instant case, even if remote, is not without significance in determining taxability. It is the plain rationale of this

Court's decisions, cited above, that the tax does not depend upon conjectures as to the relative certainty of the decedent's reversionary interests, and it is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The taxpayers also refer (Br. 12–13) to language of the Court in the *Goldstone* case to the effect that the disappearance of a decedent's reversionary interest prior to death may result in the disappearance of the estate tax liability. But clearly that language has no application at all to the instant situation where the decedent's reversionary interest persisted during her lifetime and was not cancelled or erased. Only when she died, her children surviving, did it become certain that the property would go to them rather than as the settlor might by will appoint. The decedent's death was the decisive factor which enlarged and matured the interests of the beneficiaries.

May v. *Heiner,* 281 U. S. 238, upon which the taxpayers rely (Br. 14–19) merely held that the reservation of an intermediate life estate, without more, did not make the transfer taxable; it did not involve a reversionary interest in the corpus like the one here. The taxpayers also urge (Br. 20–22) that the decision below is inconsistent with *Commissioner* v. *Irving Trust Co.,* 147 F. 2d 946 (C. C. A. 2d), and in conflict with *Estate of Fahnestock* v. *Commissioner,* 4 T. C. 1096, and

also with the decision of this Court in *Fidelity Co.* v. *Rothensies, supra.* In the *Irving Trust Co.* case the grantor reserved the right to receive the trust income in excess of a stipulated amount and the trustee had power in its discretion to pay over the corpus to the grantor. However, the court held the transfer nontaxable, distinguishing the *Fidelity Co.* case on the ground that there the grantor had a power of appointment, and taking the view that in the *Irving Trust Co.* case the decedent had disposed of the entire corpus and left no legally enforcible rights in himself either by way of reversion or otherwise. Irrespective of whether the decision may be considered correct, and even if it be inconsistent with the decisions of this Court, we submit that there is no appropriate basis for granting the instant petition, for the *Irving Trust Co.* case turns largely upon its own peculiar facts; there is plainly no direct conflict and in any event, the instant decision is clearly correct. The *Fahnestock* case is materially different from the instant one because there, although the grantor had a remote possibility of reversion he did not retain the income for life[2] and the provisions for distribution of the

[2] Although the retention of a life interest *alone* cannot be made the basis for taxability prior to the 1931 amendment to the statute (see footnote 1, *supra*, p. 4), it may nevertheless be a relevant consideration, which, taken together with other facts of the case, render the transfer one intended to take effect in possession or enjoyment at or after death.

corpus were made without reference to his death. As above noted, the *Fidelity* case is very similar to the instant one and the taxpayers' assertion of inconsistency is without merit.

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted,

J. HOWARD MCGRATH,
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SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

NOVEMBER, 1945.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.17 *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of

the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of section 81.11, adjustments in the values of such transferred estates may be required. (See section 81.15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S., 39) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S., 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v.

United States (283 U. S., 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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